

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-410

DONALD SCHANBARGER,  
Petitioner,

V

MARINE MIDLAND BANK (Executor of the  
Harriet Hendry Estate),  
Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
FOURTH DEPARTMENT APPELLATE DIVISION OF  
THE NEW YORK STATE SUPREME COURT

---

Donald Schanbarger

Salem, New York 12865  
September 1, 1979

## INDEX

Petition for Certiorari	1
Opinion Below (A 1-34)	2
Jurisdiction	2 - 3
Presented Questions	3 - 5
Issues	6
Facts of the case	7 - 14
Reasons to grant writ	14 - 16

## APPENDIX

Surrogate's Opinion	A 1 - 34
Surrogate's Decree	A 35 - 56
Appellate Division Order	A 57 - 58
Court of Appeals Order	A 59 - 60

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. \_\_\_\_\_

DONALD SCHANBARGER,  
Petitioner,  
V  
MARINE MIDLAND BANK (Executor of  
Harriet Hendry Estate),  
Respondent.

PETITION OR A WRIT OF CERTIORARI TO THE  
APPELLATE DIVISION OF THE FOURTH DEPART-  
MENT OF THE NEW YORK STATE SUPREME COURT

The petitioner Donald Schanbarger respectfully prays that a writ of certiorari issue to review the Order of the Appellate Division of the 4th Department of the New York State Supreme Court entered in its clerk's office on April 13, 1979.

( 1 )

OPINION BELOW

Opinion of Herkimer County Surrogate's Court in New York State appears in the Appendes pp 1 - 34 hereto. There are no other opinions.

JURISDICTION

The Court's jurisdiction is claimed under 28 USC 1257 (3). The April 13, 1979 Order (A 58-8) of the 4th Appellate Division of the New York State Supreme Court affirmed the September 14, 1978 Decree (A 35-56) of Herkimer County Surrogate's Court. Appeal to the New York State Court of Appeals was dismissed on June 14, 1979 by order entered in its clerk's office stating that no substantial constitutional question was directly involved (A 60), thereby exhausting petitioner's NYS judicial review of the issues below herein. The following

( 2 )

questions were raised in all courts below, which were raised for the first time in the court of first instance upon permission without objection at the hearing of the subject matter herein,

At all appellate courts below this petitioner waived all rights that were not contained in the three following questions.

#### PRESENTED QUESTIONS

1. Whether the New York State judiciary's approval of expenses of estate that resulted from unnecessary delay of an estate Executor in making distribution in the interest of the executor violates the federal Constitution's personal rights clause of the 10th Amendment & due process, equal protection & prohibited state conduct clauses of the 14th amendment, when estate executor has no tort

liability to legatee under state practice for delay in making distribution of estate funds, a jury is not available to find facts, & the executor has proceeded in poor faith by willful failure to admit all funds of the estate in past accounting that resulted in a Decree that resulted in litigation in appellate courts that executor now claims expenses for in addition to expenses for past accounting?

2. Whether failure of the New York State judiciary to take full evidence as to all activity of the executor in regard to its estate, violates the federal Constitution's personal rights clause of the 10th amendment of the due process, equal protection & prohibited state conduct clauses of the 14th amendment, when unnecessary expense, un-



(QUESTIONS PRESENTED) 5

necessary delay in distribution of funds & fraud cannot be fully proved by the objector without such evidence?

3. Whether the New York State judiciary's modification of a Decree at the urging of party that generated such Decree without showing fraud of other parties, violates the personal rights clause of the 10th amendment & the due process, equal protection & prohibited state conduct clauses of the 14th amendment, when time to appeal such Decree has expired, a party objects & modification of Decree would result in benefits to the executor that would not had enured had old Decree been complied with?

No constitutional violation was found by the New York State judiciary.

ISSUES

1. Whether expenses of an estate that resulted from unnecessary delay of executor in making distribution of money in the interest of executor, if approved is proper court conduct?

2. Whether failure of the New York State judiciary to accept full evidence in regard to executor's activity for which a hearing is held for approving executor's expenses is proper court conduct?

3. Whether a Decree of the New York State judiciary can be modified by it after time to appeal had expired without the moving party showing fraud by another, is proper court conduct?

FACTS OF THE CASE

The executor bank (respondent) obtained a Decree of Judicial Settlement pre-

pared by its agent and presented it for signing without notice on April 23, 1976 dated upon a decision dated August 25, 1975 that was upon an accounting dated June 25, 1975 showing last date of income as 3/28/75 filed with a court on ~~June~~ 30, 1975 (A23).

Donald Schnbarger timely objected to the past settlement upon grounds the account was not complete, interest was due until distribution of money of the estate and that he should be assigned assets for the interest of the legatees. Executor made verified reply that "account does reflect the true income of the estate during administration". Objections to account were dismissed. Around May 5, 1975 the executor's agent offered to pay petitioner \$4,160.36 if he would send executor's agent a release and discharge

as to all claims and demands thereunder in advance of payment.

On April 6, 1976 the Executor paid state and federal income taxes on estate income, over two weeks before it obtained the April 23, 1976 Decree that executor had assured it's accounting reflected true income during administration.

Donald Schanbarger tried to have all available courts reverse the April 23, 1976 decree which ended in failure in 1977 with failue of the US Supreme Court to review the case.

On March 7, 1978 the executor bank signed petition for supplemental Judicial Settlement stating state and federal tax payments on 4/6/76 and 4/5/77 with a total income of \$2,385.78 without statement of dates as to or from, asking for allowances for legal expenses

in defending the April 23, 1976 Decree and opposing payment directed by it.

Donald Schanbarger objected to the Supplemental account upon the general grounds of:

1. Collateral Estoppel & res judicata of a Decree that had not been satisfied in part or whole and the account was not necessary or a necessary expense that can only be had thru waste.
2. Court didn't have jurisdiction of costs for legal expenses.
3. Court didn't have jurisdiction in regard to Decree enforcement or to direct that a affidavit be issued before satisfaction.
4. Any legal fees without money amount asked for.
5. US Supreme Court did not ask for a response.

6. Any payment provision connected with appeals that were the result of executor's gross & willful negligence & fraud in making distribution of estate funds under executor's control since 1973 in a prompt way and full accounting.
7. Failure to make provision for present drawing estate interest.
8. Any cost of the supplemental account is a charge upon the executor for failure to report all assets at first judicial accounting & the \$100 bond was available to executor at first accounting.
9. Taxes are not a necessary expense, for interest is due upon the 1976 decree to the legatees.
10. No commission is do on interest it is to pay legatees.
11. No decree can include funds of another decree.



12. Jury trial is needed, and
13. Surrogate Schneider is disqualified by being overseer of complained subject matter.

The surrogate would not permit questioning of the executor's agents as to income of the estate before April 23, 1976 at the March 28, 1978 examination or hearing of May 25, 1978, holding account final as to past Decree date of April 23, 1976.

Executor's motion to enjoin filing of 1976 decree as a judgment received payment from estate money notwithstanding motion was not decided and surrogate doesn't assert such jurisdiction (A/7).

Surrogate held that funds now held by executor are and were properly so. (A20)

Surrogate held the 1975 income taxes could not have been in the original ac-

counting (A22-3), but he signed supplemental decree with taxes to decree date or within a few days (A54).

Surrogate held there was no decree of 1975 (A24).

Surrogate held funds of the 1976 Decree should not be in supplemental account (A26).

Supplemental accounting Decree reports tax payments and income (A54) after hearing on account with provisions for additional income & commissions (A54) notwithstanding such commission as well as all commissions after March 7, 1978 were waived if the decree that resulted from such accounting was not appealed, was the executor's agent's statement. Such waiver was withdrawn without notice. The same person also asserted that the money not reported in the first accounting would



had been paid if a release could had been obtained for the first accounting decree dated 1976.

It is the practice of the executor to obtain a receipt & release before payment of any money under a decree by at least 24 hours, and payment goes thru the estate attorney.

Executor did not offer to settle either account before petition for judicial settlement. There are no attorney fees for preparing an account if there is no judicial settlement in New York State. The case law of New York State is that the preferred method to settle executor's account is by out of court settlement (without attorney fees therefore).

All funds of the estate have at all times been invested.

Before February 28, 1974 the executor

had the \$100 savings bond noted at app. 49 as A-1 and advised Donald Scharbarger it was a \$25 savings bond and that there was property near Otter Lake to be sold before the estate could be closed. At the first accounting it was disclosed that the executor had not taken possession of any property. No tax payments were noticed as paid in such property.

The executor had no objection to the fees requested by its attorney's in its supplemental account.

#### REASONS TO GRANT WRIT

1. To establish that for a surrogate's hearing there must be a fair court marked by consistant actions and acception and action upon unquestioned evidence.
2. To establish that a Surrogate's Decree is as final as an order of any court. A full accounting is as such, and

a partial accounting must be so labled, not after it is exposed as such when a release was not obtainable.

3. To establish that executors must distribute estate and not work over an estate for its self interest and/or others.

4. A legatee is unable to collect full amount directed by a will without expense if executor does not make prompt distribution of estate funds because of the New York State judiciary's conduct or permissiveness to permit so called 1st Beneficiaries under its control to generate maximum income.

5. To establish that a surrogate may not use his court as state power as an implement to injure estate legattees and/or support theft of assets thru assorted procedure, but must use his court protect purchasing power of estate funds.

6. To establish that for law and equity a state court cannot award attorney fees for wrongfully conduct or without clean hands of the party seeking such fees, of which such issues must be an issue of any such claim.

### CONCLUSION

For thoes reasons, a writ of certiorary should issue to review the Order of the 4th Department Appellate Division of the New York State Supreme Court.

Submitted by,  
Donald Schanbarger  
Petitioner Pro Se

September 1, 1979

SURROGATE'S COURT - HERKIMER COUNTY

-----X

In the Matter of the Supplemental  
Judicial Settlement of the Account  
of Marine Midland Bank-Central as  
Executor of the Estate of

HARRIET I. HENDRY, a/k/a

Harriet B. Hendry,

Deceased.

-----X

SCHNEIDER, S:

On April 23, 1976 a Decree of Judicial Settlement of the Account of the above named Executor was duly entered in the above entitled matter which said Decree also provided that the Objections to said Account previously filed by Donald Schanbarger, one of the residuary legatees, be dismissed. Thereafter and on May 10, 1976, said residuary legatee, Donald Schanbarger, filed a Notice of Appeal, dated April 26, 1976, to the Appellate

Division, Supreme Court, Fourth Department, which Court thereafter affirmed the Decree of Judicial Settlement entered April 23, 1976.

Subsequently said Donald Schanbarger applied for leave to appeal to the Court of Appeals, which said application was denied. Said Donald Schanbarger thereafter applied to the Supreme Court of the United States for a Writ of Certiorari which was also denied October 3, 1977. The appeal and to the higher Courts were opposed by counsel for the Executor by filing briefs and other papers with the proper courts and appearing therein for argument.

Pending decesions in reference to the Executor withheld payment of the amounts directed to be paid to the residuary legatees under the Decree of this Court dat-



ed April 23, 1976, and on March 1, 1978, filed with this Court a Supplemental Account of Proceedings for Judicial Settlement.

The Executor in this Supplemental Account shows an increase in assets consisting of a \$100. Series E Bond from the Delbert Hendry Estate and income of \$2385.78. Schedule C, with the exception of the cost of Executor's Certificate, lists disbursements in connection with the appeal to the Appellate Division and the proceedings had in the other two courts totaling \$584.58. Schedule C further shows payment of Federal and State Income Taxes in the amount of \$45.07. Schedule H is a statement of commissions payable by reason of the additional principle and income received.

A citation was issued in the Supple-

mental Accounting proceedings and was duly served on the residuary legatees. The citation was returnable March 28th, 1978 at which time both residuary legatees appeared in person. The residuary legatee, Donald Schanbarger, requested and was granted the privilege of examining under oath the representative of the Executor pursuant to SCPA 2211(2). The record shows that Mr. Schanbarger had been previously advised that his questioning would be limited to the present accounting proceeding and the Court would not permit any questions in reference to the original Account and the Decree of Judicial Settlement entered April 23, 1975, Mr. Schanbarger then proceeded to examine Mr. Weimer, representative of the Bank-Executor as well as Mr. Manley, counsel for the Executor Bank. The matter was then



adjourned to April 11, 1978 and subsequently adjourned to April 25, 1978.

On the latter date, Mr. Schanbarger asked for a jury trial and a disqualification of the Court because of the practice going on for years of the beneficiary in certain instances having filed receipts and releases with the fiduciary prior to receiving actual payment of the money due them, and late payment to himself and other cases.

The Court is, of course, unaware of the procedure followed by each fiduciary in making payment in accordance with directions contained in the decree, nor obtaining receipts and releases. The Court is aware only that payment has presumably been made when receipts are filed. The Objectant himself, according to the petition for Supplemental Judicial Settlement,

refused to sign receipts and release for moneys due him and has further refused to cooperate with the attorney for the Executor in making arrangements, satisfactory to Objectant, for the payment of moneys which may be due him pursuant to the Supplemental Decree of Judicial Settlement to be entered herein, the reason for which the Court cannot understand unless it be to harass the attorney and the Bank in reference to any attempt on their part to do those things which must be done to carry out the directions of this Court as contained in the Decree entered or to be entered herein.

The Objectant's motion for disqualification was denied for the reason that the same was not warranted upon the grounds stated by the Objectant. The Objectant's motion for a jury trial was also denied

for the reason that the procedure to be followed upon the filing of objections is governed by SCPA 2211, which makes no provision for a trial by jury in reference to the examination of the fiduciary. The matter was further adjourned to May 9, 1978 to permit study by the Objectant and the Court of the Reply of Executor to Objections. The proceedings were further adjourned on May 9, 1978 to May 25, 1978 at which time the Objectant examined two representatives of the fiduciary and Mr. Manley the attorney for the Executor. It perhaps should be noted that the Court has taken judicial notice as requested by the Objectant, of those sections of the law mentioned by him and finds that the Objectant has not been deprived of any rights thereunder nor do such sections have any bearing on the question involved

in relation to the present proceeding.

Concerning the objections filed by the Objectant, the Court finds as to No. 1, that "It has been held that a prior Decree judicially settling the account of an administrator is res judicata only as to matters set forth in the account and embraced in the decree." The same would apply to the decree settling the account of an Executor. "Obviously also the Decree is not conclusive as to assets subsequently accruing or coming into the possession of the representative." As to new assets or liabilities, "the decree of judicial settlement is not the termination or ending of the duties of the representative in the sense or to the extent that with respect to other assets that may be realized and in connection with which new liabilities may be incur-



red the representatives may not be compelled to account." (Warren's Heaton on Surrogates' Courts, Vol. 4A, Section 402(3)(b) (3)(e), (4)(e). The Court accordingly finds that the doctrine of res judicata does not preclude the representative of the estate from filing a Supplemental Account as to assets not included in the original account and assets received and liabilities incurred subsequent to its filing its account for judicial settlements or the filing of the Decree of Judicial Settlement dated April 23, 1976. It is further provided that "During the thirty days in which an appeal may be taken, the surrogate will not ordinarily require any payments to be made under the decree." (4)(c) (supra). During the appeal taken by the Objectant, and particularly because of the nature

thereof, the Executor, in the exercise of sound discretion, lawfully withheld payment of the amounts directed to be paid by the decree of April 23, 1976 and rightly continues to do so pending the decree of this Court on reference to the judicial settlement of its supplemental accounting proceeding. Objection (1) principally refers to the original accounting and decree and the objections made by the Objectant thereto. Certainly the "Doctrine of waste" has no application in the present proceeding nor does the lack of "alleged fraud on the part of any legatee." Objection (1) is hereby dismissed for the reason hereinabove stated.

The Objectant under paragraph (2) objects "to the present accounting claims "of costs incurred at appellate courts on grounds this court doesn't have jurisdic-

tion to consider such matters and SCPA 2304 must and has not been complied with by obtaining costs at appellate courts, & not a necessary expense."

The Objectant is correct in his statement that this Court lacks jurisdiction to impose costs in reference to proceedings in appellate courts and that such costs of appeal may be allowed only by the appellate court as provided in SCPA 2304.

An examination, however, of the affidavit of Attorney Manley attached to the Petition for Supplemental judicial Settlement and his two Supplemental Affidavits, marked Exhibits (1) and (2) disclose that they are not for costs under SCPA 2304 but for legal services and expenses incurred by him in his representative capacity as attorney for the Executor since and after the filing of the

Decree of April 23, 1976 including legal fees and expenses incurred in connection with the appeal taken by the Objectant to the Appellate Division of the Supreme Court, Fourth Department, and his application to the Court of Appeals and the United States Supreme Court, and the making and filing of the Supplemental Petition and Account, and the Order to Show Cause obtained by the Objectant in the Supreme Court, Washington County, and the Order to Show Cause obtained by Attorney Manley in this court to enjoin the Objectant from docketing the Decree of this Court dated April 23, 1976 in the Herkimer County Clerk's Office.

A distinction must be made in every instance between costs and administration expenses. Warren's Heaton, Surrogate's Courts, Vol, 4B, Section 431(1)(b) states



(OPINION) A 13

"The term 'costs' includes only those fees and charges the amounts of which are fixed by statute". "Allowances are made under the discretion of the court". In Subdivision (4)(b) it is stated that "it is elementary that costs are not indemnified as indemnity, but only partial reimbursement."

Although this Court is not permitted to fix "costs" of appeal, it is permitted under SCPA 2110 and 2310 "to fix and determine the compensation of an attorney for services rendered to a fiduciary". The fiduciary also is authorized by Section 11-1.1(b) (23) EPTL to pay reasonable counsel fees. An award or allowance for counsel fees "is in all instances discretionary with the court," (SCPA 2301(2)).

Inasmuch as the claim of Attorney

(OPINION) A 14

Manley is not for "costs on appeal" but solely for legal services and expenses incurred in his representation of the fiduciary herein. Objection (2) is without merit and is therefore dismissed.

In reference to Objection (3), it is assumed that this objection, in part, is addressed to that part of the Executor's Petition for Supplemental Judicial Settlement wherein "petitioner prays for the direction of the Court as to the method of making payment and distribution of the legacy and distribution share of Donald Schanbarger and producing satisfactory proof of such payment sufficient to discharge petitioner from its liability as Executor thereon."

In regard to that portion of No. (3) wherein objection is made "to any action by this court regarding Decree enforce-

ment on grounds of lack of jurisdiction", SCPA 201 defines general jurisdiction of the Surrogate's Court. Subdivision (3) provides that "The Court shall continue to exercise full and complete general jurisdiction in law and equity to administer justice in all matters relating to the affairs of decedents ..... and to try and determine all questions, legal or equitable ..... and to make a full, equitable and complete disposition of the matter by such order or decree as justice requires."

It is believed that under this section that this Court, in its discretion, and in the interest of fairness and justice does have jurisdiction and power, if it is deemed necessary, to direct "decree enforcement".

In reference to the statement that "no

court has authority to order an affidavit to be issued that a Decree has been satisfied before satisfaction, or to file a false instrument", it perhaps should be pointed out that the prayer of the petition does not ask this Court to direct such action and consequently the matter is not before the Court for consideration.

There is nothing in the accounting proceedings concerning "failing to comply with SCPA 603 and 605." Possibly the Objectant has reference to the Order of this Court dated March 8, 1978, directing the Objectant to show cause "why an order should not be made restraining and enjoining Donald Schanbarger and Marilyn H. Campaga, as Herkimer County Clerk, from docking the Decree of Judicial Settlement dated April 23, 1976, entered in the Herkimer County Surrogate's Court in

the matter of the Estate of Harriet I. Hendry, a/k/a Harriet E. Hendry, deceased." The Order was made returnable March 28, 1978 at which time the Court deferred argument on the motion pending the Supplemental Judicial Settlement. Such motion is not a part of the present proceeding and whether or not the Court lacks jurisdiction to grant the relief prayed for in said Order, does not in any way prevent the Court from rendering a decree in the present proceeding as mandated under SCPA 2215. Accordingly, by reason of the foregoing Objection (3) is hereby dismissed.

As to Objection (4) Attorney Manley in his Supplemental Affidavits marked Exhibits 1 and 2, has set fourth the amount of "dollars and cents" claimed. Accordingly, this objection is dismissed.

It is believed that the matters referred to in Objection (5) have been previously discussed, and accordingly is dismissed.

Objection (6) relates to the original accounting and decree of judicial settlement dsted April 23, 1976, and cannot be now considered. Objection (5) accordingly is dismissed. It might be pointed out, however, that neither this Court nor any of the appellate courts were in agreement with the Objectant that there was any "gross and wilful negligence and fraud" on the part of the Executor "in making distribution of estate funds." It may be envisioned that the Objectant will assume the same attitude in reference to the supplemental Accounting Proceeding if the same is contrary to his thinking, and that he will file an appeal to any decree



of this Court which is contrary to any objections he has filed, in which event, any delay in the distribution of the funds in the estate will not be by reason of "gross and wilful negligence and fraud" on the part of the Executor "in making distribution of estate funds" but will be occasioned by the refusal of the Objectant to accept the decision of this Court and cooperate with the Executor in closing out the estate. It should not be inferred that this Court in any way suggests that the Objectant be denied his right to appeal. It is believed, however, that the Objectant should first determine whether the evidence supports his contentions as set forth in his Objections, and if so, that the Court erred in not recognizing the same in its decision. On the otherhand, if the Object-

ant has failed to produce evidence to support his objections or if his examination of the representatives of the fiduciary and its attorney failed to support such objections, or if his objections are contrary to applicable law, then no useful purpose would be served by the Objectant appealing to the appellate courts from a decision of this Court permitting the Judicial Settlement of the fiduciary's Supplemental Account. Such procedure would again cause delay chargeable to the Objectant, without "gross and wilful fraud" on the part of the Fiduciary.

In reference to Objection (7), the Court holds that the funds mentioned in Schedule A-2 of the Supplemental Account are properly held as presently retained by the Executor. As to the payment of



"interest of the estate that is presently drawing interest in commercial paper" any provision concerning payment thereof should be and will be included in the Supplemental Decree of Judicial Settlement, and should not be stated in the Account. Objection (7) accordly is dismissed.

The objections contained in No. (8) are not according to the facts. Payment of funds set forth in the Supplemental Accounting was not provided for in the previous accounting. The Supplemental Accounting includes all funds and assets not previously accounted for, including, in this case, the Series E Savings Bond shown in Schedule A-1, which, according to the attorney for the fiduciary, was in the name of Delbert Hendry alone and that by reason thereof the Bank was unable to

redeem it prior to the original accounting, and accordingly, was included in the supplemental Account. There is no expense in connection with the Savings Bond except it is, of course, includable in computing Executor's commissions. Objection (8) is accordingly dismissed.

The matter of "appeal costs" has been previously discussed and as to that part of Objection (9) same is hereby dismissed.

In reference in the payment of the 1975 Fiduciary Income Tax paid April 8, 1976, the original account shows payment only of Fiduciary Income Taxes for the years 1973 and 1974 and did not include the 1975 Fiduciary Income Tax which was paid subsequent to the filing of the original account and could not for that reason have been included therein.

The 1976 Fiduciary income Tax was not

due or payable until 1977 after the filing of the original account and the entry of the original Decree of Judicial Settlement, and is properly included in the Supplemental Account.

The original account was filed June 30, 1975. The 1975 Fiduciary Income Tax became payable in 1976 and covered only the income received during the year 1975 and not for income previously received and included in the original account. The same applied to the 1976 Fiduciary income Tax paid April 5, 1977. All such taxes were repaid and necessary expenditures pursuant to the federal and State Income Tax Law. Objection (9) is dismissed.

Objection (10) refers to Schedule H of the Supplemental Account and refers to commissions being paid "for interest to

be paid by the Executor upon the Decree of this Court of 1975, which has not been reversed or vacated". In the first place, there is no "decree of this Court of 1975." The commissions claimed in Schedule H are computed on additional assets and income received and not included in the original account nor the decree of April 23, 1976. SCPA 2307(1) provides for payment of commissions on all sums received and paid out. The fiduciary is entitled to commissions on the principal and income received is shown by Schedule H for the amount therein stated. Objection (10) is dismissed.

In reference to Objection (11) it should be noted that a Supplemental Account would not have been necessary had the Objectant not filed an appeal and taken other proceedings in connection



therewith. It should also further noted that the fiduciary would not have been compelled to incur additional administration expense had said appeal not been taken. Such administration expenses must be paid in the amount determined by the Court. Such allowance under SCPA 2301(4) "may be made payable by a party personally or out of the assets of the estate or out of the share or interest of any person or from both in such proportion as directed by the court or justice requires."

It appears to this Court that justice requires that the share of Objectant's mother to the assets and income as shown by the supplemental Account should not be diminished by charging any of the allowance for attorney's fees and expenses made necessary by the

legal proceedings commenced by her son. While the Court is in agreement that the amount directed to be distributed by the Decree of April 23, 1976 should not be included in the Supplemental Account or the Decree to be entered in connection therewith, the Court, nonetheless, believes that justice requires that the allowance for attorney fees and expenses in connection with legal proceedings brought by the Objectant should be made payable "out of the share of interest" payable to the Objectant under the Decree of April 23, 1976 and under the Decree to be entered in the Supplemental Accounting Proceeding, and that the latter Decree so provide.

Objections (12) and (13) were determined by the Court on motions during the Court hearings and were at that time de-



nied.

In reference to the "Presented Question" filed with this Court June 2, 1978, the Court determines there have been no violation of the Constitutional rights of the Objectant under the 10th and 14th Amendments to the Constitution, nor will the Decree to be entered herein be in violation thereof.

In reference to the objections filed by the Objectant, the Objectant has failed to show by his examination of the fiduciary and other witnessess that the Fiduciary has failed to keep the assets in the decedent's estate properly invested nor that there has been any loss as a result of the "executor's gross and wilful negligence and fraud in making distribution of estate funds" nor has he produced any evidence to support any of the

objections made by him.

In reference to the supplemental Account, the Court directs that the following disbursements be allowed and deducted from the gross assets \$2485.78, to wit:

1) Filing fee	\$ 25.00
2) Executor's Certificate	1.00
3) Income Tax payments	45.07
4) Commissions	<u>99.43</u>

Total ..... \$ 170.50

In reference to the allowance for legal services rendered in connection with the Supplemental Accounting Proceeding only, the Court hereby allows \$175.00 for the preparation of the Accounting proceedings and legal services rendered in connection therewith, and in addition thereto, for legal services rendered upon the return date of the citation on the Supplemental Accounting and all proceedings thereafter,

the further sum of \$175.00, which said sums aggregating \$350.00, the Court hereby determines to be the fair and reasonable value of legal services rendered by the attorney's for the fiduciary herein relation to the Supplemental Accounting proceeding.

It is further directed that said disbursements in the amount of \$170.50 and allowance for attorney fees in the amount of \$350.00, aggregating \$520.50, be allowed and charged against and deducted from the gross assets as shown by the Supplemental Account, to wit, \$2485.78, leaving a balance of \$1965.28, to be distributed as hereinafter directed.

In reference to the balance of Administration Expenses paid by the fiduciary as set forth in Schedule C, to wit, \$584.53, which said expenses were incur-

red by reason of the appeals and other proceedings taken by the Objectant herein, Donald Schanbarger, the same are hereby allowed as necessary and proper expenses incurred in opposing the appeal of the Objectant herein and other related proceedings.

That in addition to said disbursements last above mentioned it further appears that the attorney for the fiduciary has expended the sum of \$47.85 as set fourth in the affidavit of Attorney Manley, attached to and made a part of the fiduciary's petition for a Supplemental Judicial Settlement and \$9.95 as set forth in Exhibit 2 herein, and in addition thereto incurred an additional expenditure of \$675.00, (Exhibit 2), payable to the law firm of Kernan & Kernan, Esq., of Utica, New York, for preparing the brief used in

connection with the certiorari proceeding brought by the Objectant in the United States Supreme Court in reference to the appeal taken by the Objectant from a Decree of this Court dated April 23, 1976. The total amount of the last three expenditures, to wit, \$732.80 is hereby allowed and determined to be fair and reasonable expenses incurred by the attorney for the fiduciary in connection with said proceedings.

That in addition to the above expenditures, the attorney for the fiduciary has requested a further allowance of \$855.00 for legal services rendered by him in connection with said appeal and related proceedings, (Exhibit 1), and \$120.00 in connection with a proceeding brought in Washington County by the Objectant and an Order to Show Cause ob-

tained in this Court by said attorney in reference to the attempt by the Objectant to file the Decree of Judicial Settlement entered in this Court April 23, 1976 in the Herkimer County Clerk's Office as a judgment, amounting in all to the sum of \$975.00. (Exhibit 2), of which amount the Court hereby allows \$487.50 as the fair and reasonable value of said legal services rendered.

In reference to the balance remaining after deducting allowable expenses and attorney fees in connection with the Supplemental Accounting Proceeding, as herein above directed, to wit, \$1965.28. it is hereby directed that two-thirds thereof or the sum of \$1310.18 be paid to Evelyn Schanbarger, residuary legatee, in addition to the sums directed to be paid to her by the Decree of this Court



dated April 23, 1976.

In reference to the remaining one-third, to wit, \$655.10, and the amounts directed to be paid to Donald Schanbarger by the Decree of this Court dated April 23, 1976, to wit, the sums of \$50.00 and \$4110.36. aggregating \$4815.45, it is hereby directed that the following amounts herein above allowed, to wit:

Balance of Administration

Expenses paid by the Fiduciary as shown in Schedule C of the Supplemental

Account	\$ 584.53
---------	-----------

Disbursements in the amount

of	732.80
----	--------

Legal Services in the amount

of	<u>487.50</u>
----	---------------

Total ----- \$ 1894.83

be charged against the share due said

Donald Schanbarger, pursuant to Section 231(4) SCPA, and that said amount be paid Carter & Manley, attorneys for the fiduciary herein, and that the balance remaining after deducting the same, to wit, \$3010.63, be paid to said Donald Schanbarger in full satisfaction and payment of the moneys due and payable to him under said Decree of April 23, 1976 and this Supplemental Accounting.

Prepare Decree accordingly.

Dated: August 11, 1978

/s/ Albert W. Schnider

Surrogate

STATE OF NEW YORK

SURROGATE'S COURT COUNTY OF HERKIMER

In the Matter of the Supplemental :

Judicial Settlement of the account

of Marine Midland Bank-Central as :

Executor of the Estate of

HARRIET I. HENDRY :

a/k/a Harriet E. Hendry,

Deceased. :

DECREE ON SUPPLEMENTAL SETTLEMENT

File No, 52093

MARINE MIDLAND BANK-CENTRAL, the Executor of the Estate of Harriet I. Hendry, late of the Village of Ilion, in Herkimer County, New York, deceased, having filed with this Court on March 8, 1978 its Supplemental Account of the proceedings as such Executor together with its petition praying for a Supplemental Judicial Settlement thereof, and process having

thereupon duly issued pursuant to statute, directed to all person interested in the estate of said deceased, requiring them to show cause before this Court at the Court House on the 28th day of March, 1978, at 10;00 o'clock in the forenoon of that day why the said Supplemental Account should not be judicially settled, and said process having been returned with proof of service thereon Evelyn Schanbarger and upon Donald Schanbarger, and on said 28th day of March, 1978 the Executor having duly appeared by Jack Manley, of Carter & Manley, Esq. its counsel, and the said Evelyn R. Schanbarger having appeared in person, and the said Donald Schanbarger having appeared in person Pro Se, and the said Donald Schanbarger at his request having examined Paul J. Wiemer, Trust Officer of the Ex-



ecutor-Bank and Jack Manley, counsel for the Executor-Bank concerning the account, and the proceedings having been adjourned to April 11, 1978 to afford the said Donald Schanbarger an opportunity to file objections to the account if he desired, and upon the filing of Objections to the account by Donald Schanbarger and the Reply thereto of the Executor-Bank, the proceedings were further adjourned to April 25, 1978, at which time the said Donald Schanbarger moved for a jury trial and moved for a disqualification of the Court; and the proceedings were further adjourned to May 9, 1978 and subsequently adjourned to May 25, 1978, at which time the same parties and counsel again appeared, and at which time Donald Schanbarger examined as witnesses two representatives of the Executor-Bank and

also again examined Jack Manley, attorney for the Executor concerning the Supplemental Account, and the Objectant Donald Schanbarger having filed an instrument entitled "Questions Presented", the matter was submitted to the Court for its determination; and the Court having made and filed its Decision herein on August 11, 1978, finding that the Objectant Donald Schanbarger has no valid objections to the Supplemental Account of the Executor filed herein and directing the dismissal of the objections filed by said Objectant, and finding that the Objector Donald Schanbarger was not entitled to a jury trial and denying his motion therefor and further finding that the Objectant's motion that the Court be disqualified was not based upon any sufficient grounds stated by the Objector and was



denied, and finding that there have been no violation of the Constitutional rights of the Objectant Donald Schanbarger;

NOW, UPON MOTION OF JACK MANLEY, Esq., of Carter & Manley, counsel for the Executor-Bank, it is

ORDERED ADJUDGED AND DECREED, that the objections filed by the said Donald Schanbarger to the Supplemental Account, be and the same hereby are dismissed; and it is further

ORDERED, ADJUDGED AND DECREED, that the Objectant's motion for a jury trial in reference to the examination of the fiduciary be, and the same hereby is denied: and it is further

ORDERED, ADJUDGED AND DECREED, that the motion of Donald Schanbarger that the Court be disqualified from hearing this proceeding, be the same hereby is

denied; and it is further

ORDERED, ADJUDGED AND DECREED, that in answer to the "Questions Presented" by Objectant Donald Schanbarger it is hereby determined that there have been no violations of the constitutional rights of the Objectant Donald Schanbarger under the Tenth and Fourteenth Amendments to the Constitution of the United States in connection with the administration of this estate, in this proceeding, or by this Decree;

AND the Court, having examined the said Supplemental Account and the petition filed in connection therewith and the affidavits of Jack Manley annexed thereto and supplemental affidavits, now here finds that the Executor is charged as follows:

With increase, as shown by

(DECREE) A 41

Schedule A-1 100.00

With increase, as shown by

Schedule A-2 2,385.78

TOTAL ----- \$ 2,435.78

AND it appearing that the account sets fourth certain administrative expenses which the Executor credits itself, that application has been made to the Court by counsel for the Executor for allowances for legal services and expense and disbursements in connection with supplemental accounting proceeding and Appellate proceedings and other judicial proceedings occurring subsequent to entry of the Decree on the original Judicial Settlement dated April 23, 1976, and that it appears that certain of the charges, expenses and allowances should be paid out of the general fiduciary estate and certain such charges, expenses and allow-

(DECREE) A 42

ances should be paid out of the distributive share of Donald Schanbarger, it is further

ORDERED, ADJUDGED AND DECREED, that the following disbursements are hereby allowed and directed to be paid by the Executor from the gross assets in the Supplemental Account of \$2,485.78, to wit:

1. Surrogate Clerk filing fee for Supplemental Judicial Settlement as set fourth in affidavit of Jack Manley sworn to March 7, 1978 to the Petition for Supplemental Judicial Settlement \$ 25.00
2. Fee paid to Surrogate Clerk for copy of Executor's Certificate as set fourth in Schedule C of the Supple-



(DECREE) A 43

mental Account 1.00

3. Payments made by Executor

on income tax returns set

fourth in Schedule C 45.07

4. Executor's Commissions on

income set fourth in Sched-

ule H of the Supplemental

Account 99.43

Total ----- \$ 170.80

and it is further

ORDERED, ADJUDGED AND DECREED, that there is hereby allowed to Carter & Manley, counsel for Executor the sum of \$175 for legal services rendered in connection with the preparation and filing of the Supplemental Account and the Petition for Supplemental Account, and in addition thereto the further sum of \$175 for legal services rendered upon the return date of the Citation on the Citation on the Sup-

(DECREE) A 44

plemental Accounting and all proceedings thereafter through the entry of the Decree hereon, which amounts aggregate the total sum of \$350 which shall be paid by the Executor out of the gross assets of the Supplemental Account with which the Executor is charged; and it is further

ORDERED, ADJUDGED AND DECREED, that the balance of the administration expense set fourth in Schedule C of the Supplemental Account in the amount of \$584.53 are allowed and are hereby fixed and determined and shall be paid by the Executor herein as hereinafter set forth; and it is further

ORDERED ADJUDGED AND DECREED, that the following expenses and disbursements are hereby allowed, fixed and determined and which shall be paid by the Executor herein as hereinafter set forth:



(DECREE) A 45

1. To Carter & Manley as reimbursement for expenses and disbursements advanced set forth in the affidavit of Jack Manley sworn to March 7, 1978 annexed to the Petition for Supplemental Judicial Settlement

\$ 47.85

2. To Carter & Manley as reimbursement for disbursements advanced as set forth in Exhibit 2

9.95

3. To Kernan & Kernan, Esqs., of Utica, N.Y for preparation of the Brief to the United States Supreme Court set forth as an exhibit to the Petition for Supplemental Judicial Settlement and re-

(DECREE) A 46

ferred to in Exhibit 2 675.00

Total ----- \$ 732.80

and it is further

ORDERED ADJUDGED AND DECREED, that the sum of \$487.50 is hereby allowed to Carter & Manley, counsel for the Executor which is fixed and determined as a reasonable allowance for legal services rendered in connection with the Appellate proceedings, the proceeding brought in Washington County by the Objectant Donald Schanbarger, and an Order to Show Cause brought in this Court in behalf of the Executor relating to filing the Decree of this Court dated April 23, 1976 in the Herkimer County Clerk's Office as a judgment, which sum shall be paid by the Executor as hereinafter set forth; and it is further

ORDERED, ADJUDGED AND DECREED, that

(DECREE) A 47

after paying the expenses and allowances for legal services in connection with the Supplemental proceeding proceeding in the sum of \$520.50 from the gross assets of \$2,485.78, leaving a balance of \$1,965.28, the Executor is directed to distribute from such balance two-thirds thereof, to-wit the sum of \$1,310.18 to Evelyn Schanbarger, residuary legatee, in addition to the sums directed to be paid to her by the Decree of this Court dated April 23, 1976, and it is further

ORDERED, ADJUDGED AND DECREED, that with reference to the remaining one-third, to-wit, the sum of \$655.10, and the amounts directed to be paid to Donald Schanbarger pursuant to the Decree of this Court dated April 23, 1976, to-wit, the sums of \$50.00 and \$4,110.36, aggregating \$4,815.46, it is hereby directed

(DECREE) A 48

that the following amounts hereinbefore allowed, to-wit;

Balance of Administration	
Expenses paid by the fi-	
duciary as shown in Sched-	
ule C of the Supplemental	
Account	\$ 584.53
Disbursements in the	
amount of	732.80
Legal Services in the	
amount of	<u>487.50</u>

Total ----- \$ 1,804.83

be charged against the distributive share due to said Donald Schanbarger, and the balance remaining after deducting such charges, to-wit \$3,010.63, shall be paid by the Executor to Donald Schanbarger, residuary legatee, in full satisfaction and payment of the moneys due and not payable to him pursuant to the Ddcrece of

(DECREE) A 49

this Court dated April 23, 1976 and this Supplemental Accounting; and it is further

ORDERED, ADJUDGED AND DECREED, that the Executor's Supplemental Account is approved as follows:

A SUMMARY STATEMENT of the Account of Marine Midland Bank-Central as Executor of the Estate of Harriet I. Hendry, deceased, made by the Court as Judiciary Settled and Allowed:

The said Executor is chargeable as follows:

With increase, as shown on

Schedule A-1                      \$ 100.00

With increase, as shown on

Schedule A-2                      2,385.78

Total ----- \$ 2,485.78

The said Executor is credited as follows:

A. Relating to the Supplemental Account-

(DECREE) A 50

ing proceedings

(a) 1. With filing fee  
for this proceeding        \$ 25.00

2. Fee, Executor's  
Certificate                      1.00

3. Fiduciary income  
tax                                45.07

4. Statutory Exec-  
utor's Commissions        99.43

Total                      \$ 170.50

(b) Allowances for legal ser-  
vices                                350.00

Total                      \$ 520.00

\* \* \* \* \*

Gross Supplemental Assets        \$ 2,485.78

Less: (a) and (b) above        - 520.50

Net balance ----- \$ 1,965.28

#### DISTRIBUTION OF NET INCOME

Two-thirds (2/3's) share there-

of to Evelyn Schanbarger        \$ 1,310.18



One-third (1/3) thereof to

Donald Schanbarger 655.10

subject to payment of the  
following charges\*

B. \*Additional Allowances, Disbursements  
and Expenses Chargeable to Share of  
Donald Schanbarger

Payable to Donald Schanbarger pursuant  
to Decree of Original Judicial Settle-  
ment dated April 23, 1976:

(a) Legacy \$ 50.00

(b) Residuary distrib-

utive share 4,110.36

Total \$ 4,160.36

Donald Schanbarger distrib-

utive share under Supple-

mental Account 655.10

4,815.46

The Executor is credited as follows:

Balance of Schedule C \$ 584.53

Disbursements of

attorney for fi-

duciary \$ 47.85

Disbursements of

attorney for fid-

uciary per Ex-

hibit 2 9.95

Kernan & Ker-

nan - legal

services per

Exhibit 2 675.00

Total 732.80

Allowances to Carter

& Manley for legal

Services 487.50

Total \$ 1,894.83

\* \* \* \* \*

# RECAPITULATION

Total accruing to Donald

Schanbarger \$ 4,815.45

Less: Disbursements, expenses and allowances chargeable to share of Donald Schanbarger  
 ger - 1,804.83

Total distributable to Donald Schanbarger from Decree of April 23, 1976 and this Supplemental Accounting ---- \$ 3,010.63

AND it appearing from the affidavit of Paul J. Weimer, Trust Office of the Executor-Bank, filed with the Court that since the filing of the Supplemental Account herein, there has been additional income to the estate from interest on investments and expenses as follows:

Income \$ 513.01

Less expenses:

Statutory Executor's

Commission 4% \$ 20.52

Fiduciary income

taxes paid to internal Revenue Service and State of New York

26.44

Total expenses 46.96

Net income ----- \$ 466.05

and it is further

ORDERED, ADJUDGED AND DECREED, that the sum of \$466.05 net additional income be distributed by the Executor by the payment of two-thirds (2/3's) of such amount to Evelyn Schanbarger, residuary legatee, and one-third (1/3) of such amount to Donald Schanbarger, residuary legatee, and it is further

ORDERED ADJUDGED AND DECREED, that any additional and subsequent income to this estate after the deduction of statutory commissions and other expenses, shall be paid and distributed by the Ex-

(DECREE) A 55

ecutor on the basis of two-thirds (2/3's) thereof to the said Evelyn Schanbarger and one-third (1/3) thereof to Donald Schanbarger.

AND it appearing that said Executor has accounted for all moneys and property of the estate of the above named deceased which have come into the hands as such Executor, and its account having been adjusted by this Court, and a summary statement of the same having been made as above to be recorded herewith and to be taken as part of this Decree, it is further

ORDERED, ADJUDGED AND DECREED, that upon making the payments aforesaid and taking and filing receipts thereof, the said Marine Midland Bank be and it hereby released and discharged from all further liability and responsibility as such Ex-

(DECREE) A 56

ecutor and as to all matters embraced in this account and determined by this Decree.

Dated September 14, 1978

ENTER

/s/ Albert W. Schneider

Albert W. Schneider

Surrogate



SUPREME COURT OF THE STATE OF NEW YORK  
Appellate Division, Fourth Judicial  
Department

PRESENT: SIMONS, J.P., HANCOCK,  
SCHNEPP, DOERR, MOULE, JJ

---

In the matter of the Supplemental Ju-  
dicial Settlement of the Account of  
Marine Midland Bank as Executor of the  
Estate of Harriet I. Hendry, a/k/a  
Harriet E. Hendry, Deceased.

---

Donald Schanbarger, Appellant,  
Marine Midland Bank, Respondent.

---

The above named Donald Schanbarger,  
respondent in this proceeding, having  
appealed to this Court from a decree of  
Herkimer County Surrogate's Court, en-  
tered in the office of the Clerk of

said court on September 14, 1978 and  
said appeal having been submitted by  
Donald Schanbarger appellant, Jack Man-  
ley of counsel for respondent, and due  
deliberation having been had thereon.

It is hereby ORDERED, That the decree  
so appealed from be, and the same hereby  
is unanimously affirmed without costs.

Entered: April 13, 1979

/s/ Mary F. Zoller

MARY F. ZOLLER, Clerk

(COURT OF APPEALS ORDER) A 59

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court  
of Appeals Hall in the City of Albany  
on the fourteenth day of June A.D. 1979  
PRESENT, HON. LAWRENCE H. COOKE,  
Chief Judge, presiding.

---

4 Mo. No. 617 SSd 53

In the Matter of Harriet I. Hendry,  
a.k.a. Harriet E. Hendry.

Donald Schanbarger, Appellant,

vs.

Marine Midland Bank, Respondent.

---

The appellant having filed notice of  
appeal in the above title and due con-  
sideration having been thereupon had, it  
is

Ordered, that the appeal be and the

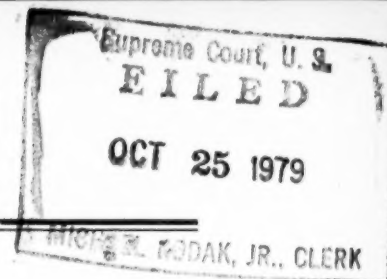
(COURT OF APPEALS ORDER) A 60

same hereby is dismissed without costs,  
by the Court sus sponta, upon the ground  
that no substantial constitutional  
question is directly involved.

/s/ Donald M. Sheraw

Donald M. Sheraw

Deputy Clerk of the Court



---

IN THE

**Supreme Court of the United States**

**October Term, 1979.**

---

No. 79-410

---

DONALD SCHANBARGER,

*Petitioner,*

*vs.*

MARINE MIDLAND BANK (Executor of the HARRIET  
HENDRY ESTATE),

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK  
STATE COURT OF APPEALS.

(Entitled by Petitioner as "Petition for a Writ of Cer-  
tiorari to the Fourth Department Appellate Division  
of the New York Supreme Court.")

---

---

**BRIEF FOR RESPONDENT IN OPPOSITION.**

---

---

JACK MANLEY

*Attorney for Respondent*

97 West Street

Ilion, N. Y. 13357

(315) 895-7771

---

---



## Table of Contents.

	Page
Opinion .....	1
Jurisdiction .....	2
Question Presented .....	2
Constitutional Provisions Involved .....	2
Statement of the Case .....	3
ARGUMENT:	
A. The Federal question asserted by petitioner is not presented by the record .....	5
B. Assuming that a Federal Question was presented it was insubstantial .....	7
C. The State Court judgment sought to be reviewed is supported by adequate non-federal grounds .....	8
CONCLUSION. For the foregoing reasons, respondent says that the petition for a Writ of Certiorari should be denied .....	9

## TABLE OF CASES.

	Page
Benz v. New York State Thruway Authority, 369 U. S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634 .....	7
Erie Railroad Co. v. Kirkendall, 266 U. S. 185, 45 S. Ct. 33, 69 L. Ed. 236 .....	5
George O. Richardson Machinery Co. v. Scott, 276 U. S. 128, 48 S. Ct. 264, 72 L. Ed. 497 .....	8
Harris v. Zion's Savings Bank & T. Co., 313 U. S. 541, 61 S. Ct. 840, 85 L. Ed. 1509 .....	8
Honeyman v. Hanan, 302 U. S. 375, 58 S. Ct. 273, 82 L. Ed. 312 .....	7
Johnson v. Thornburgh, 276 U. S. 601, 48 S. Ct. 322, 72 L. Ed. 725 .....	8
Mellon v. McKinley, 275 U. S. 492, 48 S. Ct. 34, 72 L. Ed. 390 .....	5
McClanahan v. Moraver & Hartzell, 404 U. S. 16, 92 S. Ct. 170, 30 L. Ed. 2d 136 .....	7
Newsome v. Smyth, 365 U. S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803 .....	5
Palmieri v. State of Florida, 393 U. S. 218, 89 S. Ct. 440, 21 L. Ed. 2d 389 .....	7

IN THE

**Supreme Court of the United States**

October Term, 1979.

No. 79-410.

---

 DONALD SCHANBARGER,
*Petitioner,**vs.*

MARINE MIDLAND BANK (Executor of the Harriet Hendry Estate),

*Respondent.*ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK  
STATE COURT OF APPEALS

(Entitled by Petitioner as "Petition for a Writ of Certiorari to the Fourth Department Appellate Division of the New York Supreme Court.")

**BRIEF FOR RESPONDENT IN OPPOSITION.****Opinion.**

The only opinion was that delivered by Surrogate's Court, Herkimer County, State of New York—the court of original jurisdiction. It is not officially reported but is appended to the Petition for a Writ of Certiorari (pp. A. 1 to A. 34).

### **Jurisdiction.**

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. 1257 (3).

### **Question Presented.**

Petitioner's Statement of the Cases and Issues Presented require re-framing of the question presented to read as follows:

Where a corporate fiduciary brings on a proceeding for judicial settlement of its account as Executor of a Will and petitioner, as a legatee, under the Will and party to the proceeding, presents a list of objections to the account which present non-federal issues for determination by the State Court, and after the hearing thereon presents a federal issue of claimed deprivation of petitioner's Federal constitutional rights without requesting a hearing or argument thereon, which issue, in substance, is presented for purposes of an appeal, is the State court judgment supported by adequate non-federal grounds so as to require denial of the application for a writ of certiorari?

### **Constitutional Provisions Involved.**

United States Constitution:

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Fourteenth Amendment:

"Section I \* \* \*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### **Statement of the Case.**

The statement of petitioner was prepared in disregard of the applicable principles of review that the federal questions sought to be reviewed were necessarily involved in the case; that they were properly presented to the State Court in accordance with State practice and lastly, whether the State Court judgment sought to be reviewed is supported by adequate nonfederal grounds.

Respondent, Marine Midland Bank, was appointed Executor of the Will of testatrix on September 18, 1973. In June, 1975 the Executor brought a proceeding to settle its final account. Petitioner, Donald Schanbarger, one of the legatees, appeared in the proceeding and filed objections to the account (P. 6-7).<sup>\*</sup> The objections were dismissed by the Surrogate and a Decree of Judicial Settlement of the account was duly entered on April 23, 1976 (P. 7; A. 1).<sup>\*</sup>

Petitioner appealed to the Appellate Division, Supreme Court of New York, Fourth Department, which unanimously affirmed the decree (A. 1-2).

Petitioner then applied to the New York Court of Appeals for leave to appeal, which was denied by that Court by order entered March 29, 1977 (A. 2).

<sup>\*</sup>References "P" are to pages of the Petition for a Writ of Certiorari, and references "A" are to the appendix submitted with the Petition.



Petitioner then filed a petition to this Court for a Writ of Certiorari to review the proceedings in the New York Courts which application (No. 77-197) was denied on October 3, 1977 (P. 8; A. 2).

Petitioner's statement of Facts of the Case at pages 6 through 8 of his Petition relate to the first or original account for judicial settlement in Surrogate's Court and the subsequent appeals.

In March, 1978 the Executor filed a Supplemental Account reporting additional income, seeking approval of expenses incurred by the Estate and allowances for counsel in defending petitioner's various appeals, and in effect updating its accounting (A. 35). Petitioner filed thirteen objections to this supplemental accounting on April 11, 1978 (P. 9; A. 37). These objections were heard on April 25 and May 25, 1978 (A. 5 and 7). The Surrogate overruled and dismissed all of the objections of petitioner (Opinion A. 1-28; Decree A. 39).

Three so-called "constitutional questions" were filed as a separate instrument with the Surrogate on June 2, 1978 (A. 27), designated as "Questions Presented" (P. 3). The Surrogate's Court found and determined that there had been no violation of the constitutional rights of petitioner under the Tenth and Fourteenth Amendments to the Constitution (A. 27, 40).

Petitioner's statement of the facts concerning the 1978 Supplemental Accounting before the Surrogate appear in the Petition at pages 8 through 14.

Petitioner appealed to the Appellate Division, Supreme Court of New York, Fourth Judicial Department, from the Decree of the Surrogate's Court entered September

14, 1978 approving the Supplemental Account. The Appellate Division unanimously affirmed the Decree by order entered April 13, 1979 (A. 58). Petitioner appealed to the Court of Appeals of the State of New York and such appeal was dismissed by that Court by order made and entered on June 14, 1979, "upon the grounds that no substantial constitutional question is directly involved" (A. 60).

## ARGUMENT.

### A.

**The Federal question asserted by petitioner is not presented by the record.**

*Newsome v. Smyth*, 365 U. S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803;  
*Sutter v. Midland Valley R. Co.*, 280 U. S. 521, 50 S. Ct. 65, 74 L. Ed. 590;  
*Mellon v. McKinley*, 275 U. S. 492, 48 S. Ct. 34, 72 L. Ed. 390;  
*Erie Railroad Co. v. Kirkendall*, 266 U. S. 185, 45 S. Ct. 33, 69 L. Ed. 236.

These decisions support the well recognized principle that the grounds presented in a petition for certiorari must have a solid basis in the record and that the federal questions were necessarily involved in the case. The record herein demonstrates that such proof is absent therefrom.

Petitioner did not assert any Federal constitutional questions in his list of objections heard, passed upon and dismissed by the Surrogate. Petitioner, apparently

with knowledge that a Federal issue could not be raised for the first time in this Court (*Tacon v. State of Arizona*, 410 U. S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346), carefully asserted the Federal constitutional questions in an instrument entitled "Presented Questions" filed with the Surrogate on June 2, 1978 (A. 27) after the hearing on his objections had been concluded. Petitioner presented no argument or discussion and did not ask for a hearing on the "Presented Questions." Petitioner made no effort to show in what way his constitutional rights were violated by the proceedings. It would appear that the questions presented were filed only for the purposes of an appeal.

The result is that not only was the Federal question not properly presented for the State Court to pass thereon but, it is submitted, the procedure is shown to have been a device for the purpose of the present application.

Petitioner's constitutional question No. 1 is whether the lower Court's "approval of expenses of the estate" violates the Tenth and Fourteenth Amendments of the United States Constitution. This issue involved determination by the Surrogate whether the expenses, fees, and disbursements claimed were authorized by New York statutory law and were reasonably necessary, and whether the amounts claimed were reasonable. No constitutional issue was involved, directly or indirectly.

Petitioner's constitutional question No. 2 is that "failure of the New York State Judiciary to take full evidence as to all activity of the executor" violates the Tenth and Fourteenth Amendments to the United States Constitution. This issue relates to the admission or rejection of evidence at the hearing on the objections before the lower Court, and not the construction or application of any constitutional provision.

Question No. 3 is interpreted to be an allegation by the petitioner that the Surrogate's signing of the Decree for Supplemental Judicial Settlement entered September 14, 1978, had the effect of modifying the original Decree for Judicial Settlement entered April 23, 1976, in the first proceeding without the showing of any fraud. Petitioner has failed to show that this issue in any way asserted a Federal constitutional question.

### B.

**Assuming that a Federal Question was presented it was insubstantial.**

Under the provisions of both Section 1257 (3) of the Judicial Code (28 U.S.C. §1257 [3]) and Rule 19 of the Supreme Court Rules, the authority of this court to review a state court judgment on certiorari depends on the existence of a substantial federal question. Moreover, Rule 19 indicates that regardless of whether the court below is a state court or a federal court there must be "special and important reasons" for granting a writ of certiorari.

These principles have been implemented not only in denying applications for writs but in dismissing writs as improvidently granted.

*McClanahan v. Moraver & Hartzell*, 404 U. S. 16, 92 S. Ct. 170, 30 L. Ed. 2d 136;  
*Palmieri v. State of Florida*, 393 U. S. 218, 89 S. Ct. 440, 21 L. Ed. 2d 389;  
*Benz v. New York State Thruway Authority*, 369 U. S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634;  
*Honeyman v. Hanan*, 302 U. S. 375, 58 S. Ct. 273, 82 L. Ed. 312.

## C.

**The State Court judgment sought to be reviewed is supported by adequate non-federal grounds.**

Where the decision of a State Court is based on both federal and non-federal grounds, there is no opportunity for review by this Court if the non-federal grounds are themselves adequate to support the judgment.

*Harris v. Zion's Savings Bank & T. Co.*, 313 U. S. 541, 61 S. Ct. 840, 85 L. Ed. 1509;  
*Utilities Insurance Co. v. Potter*, 312 U. S. 662, 61 S. Ct. 804, 85 L. Ed. 1109;  
*Johnson v. Thornburgh*, 276 U. S. 601, 48 S. Ct. 322, 72 L. Ed. 725;  
*George O. Richardson Machinery Co. v. Scott*, 276 U. S. 128, 48 S. Ct. 264, 72 L. Ed. 497.

There was presented herein to the State Court a routine application by an Executor for a Supplemental Judicial Settlement of its account. Petitioner, as a legatee, appeared and filed objections to the account. Petitioner examined witnesses and various hearings were held concerning the objections. Petitioner was given every opportunity to submit his proof and substantiate his objections. The Surrogate in a lengthy and carefully reasoned opinion dismissed all of the objections and found that there had been no violations of petitioner's constitutional rights in connection with the administration of the estate, in the proceedings for Supplemental Accounting, or by the Decree. The Appellate Division, Fourth Department, on appeal, unanimously affirmed the Decree. The Court of Appeals of the State of New York dismissed an appeal on the ground that no substantial constitutional question was directly involved.

Petitioner has had his day in Court and the grant of a writ of certiorari herein would, in substance, present to this Court only the correctness of the judgment of the State Court based upon non-federal grounds.

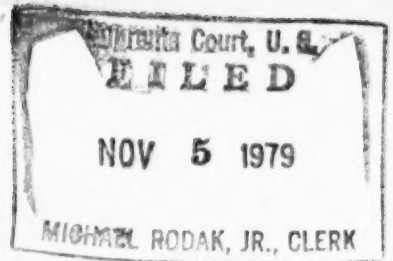
## CONCLUSION.

**For the foregoing reasons, respondent says that the petition for a Writ of Certiorari should be denied.**

Respectfully submitted,

JACK MANLEY,  
 Attorney for Respondent,  
 97 West Street,  
 Ilion, N. Y. 13357  
 (315) 895-7771.





IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1979

-----  
No. 79 - 410  
-----

DONALD SCHANBARGER,

Petitioner,

V

MARINE MIDLAND BANK (Executor of the  
Harriet Hendry Estate),

Respondent.

-----  
PETITION FOR A WRIT OF CERTIORARI TO THE  
FOURTH DEPARTMENT APPELLATE DIVISION OF  
THE NEW YORK STATE SUPREME COURT

-----  
PETITIONER'S REPLY  
-----

Donald Schanbarger

Salem, New York 12865

October 31, 1979

**Petitioner's Reply**

**INDEX**

**Reply** 1 - 8

**U.S. Constitution Amendments:**

10th 7

14th 7

**N.Y.S. Constitution**

Art 6, sec. 7 3

**N.Y.S. Statute CPLR:**

104 3

4511 3

5528 3

**Case:**

Re Murchison, 349 US 133 2

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1979

-----  
No. 79 - 410  
-----

DONALD SCHANBARGER,

Petitioner,

V

MARINE MIDLAND BANK (Executor of the  
Harriet Hendry Estate),

Respondent.

-----  
PETITION FOR A WRIT OF CERTIORARI TO THE  
FOURTH DEPARTMENT APPELLATE DIVISION OF  
THE NEW YORK STATE SUPREME COURT

-----  
PETITIONER'S REPLY  
-----

The respondent has not questioned the facts of the case as represented by the petitioner, petitioner suggests that sum-

mary reversal is now in order.

The respondent asserts in substance that this Court doesn't have jurisdiction. The major thrust of the questions presented by the petitioner is upon law and facts against the state judiciary as to whether there was a fair court. A fair tribunal is basic requirement of Due process (In Re Murchison, 349 US 133). The original questions as present to this Court were prepared at the hearing and offered at the hearing before the petitioner (objector) rested his case, where he was told by the Surrogate to submit them by filing them, to which the respondent by Mr. Manley so stipulated, which respondent could submit a reply, which was not done. After the above procedure was directed and before the end of the hearing Donald Schanbarger



he would frame the questions as he saw fit and would not be limited to times after April 23, 1979. The Surrogate said "We are concerned only with the constitutional questions from the date of decree of April 23, 1976 to date and the Court will not consider anything prior to that time, so be guided accordingly."

N.Y.S. civil practice limits presented questions to 2 pages (CPLR Rule 5528), requires every court to take judicial notice of the federal constitution (CPLR Rule 4511), construction of the CPLR shall be construed to secure just, speedy and inexpensive determination (CPLR sec. 104), and the N.Y.S. Court of Appeals is limited to matters of law in this case (N.Y.S. Constitution, Art. 6, sec. 7).

The Surrogate's Decree (at Pet. A 10) & Opinion (Pet. A 27) found there were

no constitutional violation of rights in answer to the questions presented to this Court, and such Decree was unanimously affirmed (Pet. A 58) by the 4th Dept. Appellate Div. of the N.Y.S. Supreme Court. It appears that the N.Y.S. judiciary had supported the procedure of raising the constitutional questions as directed by the Surrogate and agreed to by Mr. Manley, who now objects to the procedure. Such objection should not now be considered.

The presented questions could be considered as an amendment to the objections to the account.

Petitioner's question #2 by its nature could not reasonably be assured until during the hearing. # 1 & # 3 could have been assured before the hearing or after the Decree or opinion was issued by mov-

ing for re-argument and claiming surprise that the Court found that an appeal stays a civil order past appellate proceedings, expenses incurred thru negligence of executor was charged to legatee(s) or estate, and the Court had not taken consistent positions in the case. However with a talkative Surrogate it was obvious what he would do, so there didn't seem to be good reason to wait for the obvious to happen, but to promptly assurt constitutional constraints upon the Court's conduct in the record at the hearing when the Court could change its course at its hearing. It appears that the failure of the appellate courts to support this petitioner in the past had increased his boldness in approving wrong doing of the executor. Any motion for re-argument would had been repetitious and not had

any change in the conduct of the Surrogate, and a waste of time & expense.

It would seem if there is a fair court there would not be any need of assurtion of constitutional rights. The executor has the record show by its testimoney at the hearing that the supplemental account reflects interest from April 23, 1976 (date of first Decree) thru March 7, 1978. That leaves around one year of estate interest that is not accounted for, but the last Decree approves income tax payments for the tax year the executor denies account includes. What becomes or became of one years interest must be called an unseemly question.

Should this Court find that members of the N.Y.S. judiciary have willfully and/or in a concerted manner elected to deny the petitioner of any constitutional



right secured by the 10th & 14th amendments, then there is surely a "special and important reasons" for granting a writ of certiorari to review an Order issued without federal or state grounds.

We quickly come to the question as to how to enforce any constitutional right determined by the U.S. Supreme Court as to what state courts can and/or cannot do. Let us say that a legatee has limitless Constitutional right to examine the opponent into matters of intent of mind if it is an issue of a case, and a court refuses to take such evidence. Would failure to file a text book of assault rights before trial preclude such? Should a person bring on a special independent motion after trial asserting such a right, or should right assertion be at a hearing when a court could change its

ascrew characteristic?

The procedure that was used to raise the constitutional questions was the idea and direction of the Surrogate as agreed to by the respondent and complied with by the petitioner, thus the issue of jurisdiction of this court is without merit.

The remaining question seems to be if this Court finds the conduct of the courts below to be of significance and/or outrageous enough to justify reversal of the order below in part or whole.

Petitioner urges this Court accept all facts stated herein should they not be challenged within 10 days of service.

Submitted by

Donald Schanbarger

Petitioner

Salem, New York 12865

October 31, 1979